87-838

Supreme Court, U.S.
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No. .....

In The
Supreme Court of the United States
October Term, 1987

HOWARD WILLIAMS,
Petitioner,

v.

INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD, namely: BRUCE HAWKINS, ELEANOR BUTLER; TERRY CHILDRESS; JOHN MULL; SAM WAKEFIELD; BEN COZORT; J. T. KINCAID; JAMES D. WILSON, Superintendent of Burke County Schools; FRED CRANFORD; ERWIN HALLYBURTON; T. W. WALL; BILLY CAROWAY; GARY OGLE; ED HARDIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a public employee can meet his burden of proving that protected speech was a motivating factor in his dismissal by circumstantial evidence and by evidence that the employer's alleged reasons for the discharge are pretexual.

II. Whether the Court of Appeals sanctioned a serious departure from the accepted and usual course of judicial proceedings by the District Court in this action.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Howard Williams respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case entered on July 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in the Appendix attached hereto (App. p. A-1). The opinion of the District Court is unreported and is printed in the Appendix attached hereto (App. p. A-3).

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JURISDICTION

The Judgment of the Court of Appeals was entered on July 16, 1987. The petitioner's Petition for Rehearing was denied by the Court of Appeals on August 12, 1987. This Court has jurisdiction to review the Judgment of the Court of Appeals by certiorari pursuant to 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution, Amendment XIV, § 1, provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

———o———

STATEMENT OF THE CASE

In this action, Howard Williams, a tenured teacher in the Burke County School System, alleges that he was discharged from his employment on December 3, 1984, in violation of his rights under the First and Fourteenth Amendments to the United States Constitution. Specifically, the plaintiff contends that his employment was terminated because he criticized the principal of East Burke High School in a private conference with the Superintendent of Schools and he published an article in a local newspaper criticizing proposals for a merit pay system for teachers. In his Complaint, the plaintiff sought compensatory damages. This action was brought pursuant to

42 U.S.C. § 1983, and the District Court's jurisdiction was founded on 28 U.S.C. §§ 1331 and 1343.

This case was called for bench trial before the Honorable Woodrow Wilson Jones, United States District Judge for the Western District of North Carolina, on December 2, 1986. The plaintiff appeared *pro se*. On December 8, 1986, the District Court entered a Judgment dismissing the plaintiff's action. In his Memorandum of Decision, the District Judge found that the plaintiff had failed to prove by a preponderance of the evidence that his exercise of his right to freedom of speech was a motivating factor in the defendants' decision to discharge him.

The United States Court of Appeals for the Fourth Circuit affirmed the Trial Court's decision by a *per curiam* opinion dated July 16, 1987. The Court of Appeals denied the plaintiff's petition for re-hearing on August 12, 1987.

The evidence introduced at the trial of this action established the following facts:

The plaintiff was a tenured English teacher in the Burke County School System. He was initially hired on September 30, 1971, and was assigned to East Burke High School in 1974.

In May, 1983, the plaintiff and another teacher met with Dr. James D. Wilson, the Superintendent of Burke County Schools, to discuss certain problems they perceived in the way in which the principal of East Burke High School, T. W. Wall, was performing his duties. Specifically, the plaintiff expressed his concern about Wall's decision to permit rock music concerts to be held at the

school. Two such concerts were held during that school year and had resulted in serious disturbances at the school. The plaintiff also complained about frequent interruptions of his classes by Wall and the administrative staff of the school.

Wilson assured the plaintiff that this conversation would remain confidential. However, prior to the next school year, the plaintiff was advised that he would be transferred from East Burke High School to Morganton Junior High School. The plaintiff filed a grievance concerning this transfer, and, at the hearing on this grievance, he learned that Wall had become aware of the content of his conversation with Superintendent Wilson. The primary reason given for the plaintiff's transfer to a lower school was an alleged personality clash with Wall.

Following his meeting with Superintendent Wilson, the plaintiff noticed a dramatic increase in the number of visits to his classroom by members of the school administration. He also received an unfavorable evaluation from Wall for the 1982-1983 school year, the first negative evaluation he had received in three years.

The plaintiff's transfer to Morganton Junior High School was effective as of August 16, 1983. On October 13, 1983, the plaintiff wrote an article for a local newspaper criticizing certain proposals concerning merit pay systems for teachers. In particular, the plaintiff stated that such systems were flawed because they required frequent, disruptive visits to classrooms by school administrators. The principal of Morganton Junior High School, Billy Caroway, advised the plaintiff that he did not agree with the content of this article.

Throughout the 1983-1984 school year, the frequency of visits to the plaintiff's classroom by school administrators increased. Further, the plaintiff was required to attend regular counseling sessions in order to "improve" his teaching skills and disciplinary techniques. Although the plaintiff cooperated with these efforts, he was suspended with pay for inadequate performance on May 1, 1984. Following a brief investigation, the Superintendent of Schools suspended the plaintiff without pay on May 22, 1984. Following a hearing before a Professional Review Panel, the plaintiff was discharged from his position as a tenured teacher on December 3, 1984.

The plaintiff contends that his transfer from East Burke High School to Morganton Junior High School, the harassment and intimidation he experienced at both schools, and his ultimate discharge constituted retaliation against him for his exercise of his right to freedom of speech. In particular, the plaintiff contends that his criticism of Wall during his private conversation with Superintendent Wilson and his subsequent newspaper article set in motion a series of retaliatory events, beginning with his transfer to a lower school, which ultimately led to his dismissal.

The defendants contend that the plaintiff was discharged solely for inadequate performance and that his free speech activities were not a factor in the School Board's decision to terminate his employment.

When this action came on for trial, the plaintiff was not represented by counsel. Throughout the trial, the District Judge was actively involved in the direct and cross examination of witnesses and repeatedly chastised

the plaintiff for deviating from the Court's view of the issues in the action. In particular, the District Judge advised the plaintiff at the beginning of the trial that evidence of his job performance was not relevant to the issues in the action and then refused to permit the plaintiff to examine witnesses called to testify about his performance. Nevertheless, in his Memorandum of Decision the District Judge made findings of fact concerning the plaintiff's job performance and specifically found that the plaintiff was discharged due to "inadequate performance."

A review of the entire trial transcript reveals a persistent effort by the District Judge to speed the trial along at all costs and to limit the scope of the plaintiff's evidence. As a result of this interference by the Court, the plaintiff was prevented from presenting his case in an orderly manner. The plaintiff contends that the Court's behavior deprived him of his right to a full and fair trial on the merits of his action.

———o———

ARGUMENT

By affirming the Judgment of the District Court in this action, the United States Court of Appeals for the Fourth Circuit implicitly decided an important issue concerning the type of evidence required to show that a public employee's exercise of his freedom of speech was a motivating factor in an adverse employment decision. This ruling is in conflict with the decisions of other courts of appeals on the same issue. Further, by failing to comment

—upon the manner in which this trial was conducted, the Court of Appeals sanctioned a serious departure from the accepted and usual course of judicial proceedings.

I. Important Questions of Federal Law.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court held that it is the public employee's burden to show that his constitutionally protected expression was a "substantial" or "motivating" factor in the employer's adverse decision or conduct. Once the employee satisfies this burden, the employer must then show that it would have reached the same decision even in the absence of the protected expression. 429 U.S. at 287. However, as stated in *Clark v. Library of Congress*, 750 F.2d 89, 101 (D.C.Cir. 1984), this Court

> . . . has provided no guidance concerning the manner in which the *Mt. Healthy* standard can be met. It is clear, however, that a plaintiff need not present direct evidence, *e.g.*, admissions of selecting officials, to meet his burden of showing that protected conduct was a substantial or motivating factor in the hiring decision. In *Allaire v. Rogers*, 658 F.2d 1055, 1058-64 (5th Cir. 1981), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1975, 72 L. Ed. 2d 443 (1982), the Fifth Circuit sanctioned the plaintiff's use of circumstantial, including statistical, evidence in satisfying the *Mt. Healthy* test. *See also Burris v. Willis Independent School District*, 713 F.2d 1087, 1095 (5th Cir. 1983) (limited circumstantial evidence sufficient to support jury verdict under *Mt. Healthy* standard). This court holds that [the plaintiff] may use such evidence in attempting to meet the *Mt. Healthy* standard.

In the Memorandum of Decision in the present action, the District Judge stated that:

> The deficiency in Plaintiff's allegations is that there are no witnesses to substantiate his claims and nothing in the record to link Plaintiff's speech with his eventual dismissal. (App. p. A-9)

In essence, therefore, the District Court ruled that, without direct evidence of unlawful motive, the plaintiff could not meet his burden of proof.

The plaintiff attempted to demonstrate the causal link between his free speech activities and his discharge through circumstantial evidence. The plaintiff testified that, following his private conference with Superintendent Wilson, administrative harassment, in the form of increased classroom visits and frequent supervisory conferences, intensified. The plaintiff was then transferred to a lower school, for the stated reason that his relationship with Principal Wall had become strained. After this transfer, and following the publication of the plaintiff's newspaper article, this interference with the plaintiff's performance of his teaching duties became overwhelming, and he was ultimately discharged.

The defendants alleged and presented evidence to show that the plaintiff's performance as a teacher was inadequate and that this intensified supervision was simply part of an effort to "salvage" his career. In response to this allegation, and as part of his case in chief, the plaintiff attempted to present evidence, through the testimony of fellow teachers and students, that his teaching abilities were satisfactory and that this administrative interference was unjustified. The District Judge ruled at the beginning of the trial that such evidence was inadmissible because "this case is not whether or not [the plaintiff was] a good teacher or bad teacher."

The question presented by this ruling, therefore, is whether a public employee can attempt to establish his employer's motivation through circumstantial evidence and by evidence that the employer's alleged reasons for the adverse action were pretextual.

Several circuit courts of appeal have considered these questions and reached a conclusion different from that of the District Judge and the Fourth Circuit. For example, in *Holley v. Seminole County School District,* 755 F.2d 1492 (11th Cir. 1985), a tenured high school teacher alleged that his teaching contract was not renewed in retaliation for his First Amendment protected political activity. The school board maintained, however, that he was discharged because of certain improper behavior, such as using vulgar language and leaving school grounds without permission. In order to meet his burden of proof on the motivation issue, the plaintiff attempted to present evidence that other teachers had engaged in similar behavior and had not been punished. The District Court ruled that such evidence was irrelevant. The Eleventh Circuit reversed this ruling, stating that:

> If other teachers had been engaged in similar improper conduct known to the superintendent, other administrators, and/or the Board of Education and those teachers were not disciplined, an obvious inference is raised that Holly was disciplined for reasons other than the improper teacher conduct. Holley should have been allowed to present such evidence in the district court because it would have tended to indicate that the Board's reasons for nonrenewal were pretextual. . . . Again, the issue is not whether the Board had objective reason not to renew Holley—it apparently

> did—but rather what in fact motivated the Board in light of Holley's political activity.

755 F.2d at 1505.

Similarly, in *Solis v. Rio Grande City Independent School,* 734 F.2d 243 (5th Cir. 1984), several teachers alleged that they were not hired for a summer term of school because they had supported unsuccessful candidates in a school board election. In an effort to prove motivation, the plaintiffs presented evidence that they were open in their campaign activities, that they were qualified for the positions available, and that they were not chosen. The Fifth Circuit held that this circumstantial evidence was sufficient to support the jury's conclusion that the plaintiffs' support for the opposition candidates was a substantial or motivating factor in the hiring decision. 734 F.2d at 247. No direct evidence of the defendant's motivation was required.

Finally, in *Cox v. Dardanelle Public School District,* 790 F.2d 668 (8th Cir. 1986), the Court ruled that the plaintiff teacher could, at least in part, meet her burden of proof on the motivation issue by demonstrating that charges of insubordination advanced by the defendants were "pretextual and insignificant." 790 F.2d at 675.

By affirming the District Court's decision in the present action, the Fourth Circuit sanctioned the Trial Judge's ruling that the plaintiff must present direct evidence in order to establish unlawful motivation and that evidence demonstrating that the defendant's stated reasons were untrue was irrelevant. By adopting these rulings, the Fourth Circuit placed itself in conflict with the decisions of the Fifth Circuit, Eighth Circuit and Eleventh

Circuit set forth above. This Court should therefore review this case in order to resolve this conflict and to settle this important question of federal law.

II. Unacceptable and Unusual Course of Judicial Proceedings.

The transcript of the trial of this action demonstrates that the District Court departed from the accepted and usual course of judicial proceedings. By affirming the District Court's decision without opinion, the Court of Appeals sanctioned this departure. This Court should exercise its power of supervision over the lower federal courts by reviewing the conduct of this trial.

The plaintiff, proceeding *pro se,* lost his case before he called his first witness. The District Judge's comments throughout the trial made it clear that, from the beginning, he felt as if the plaintiff did not have a case. At the end of the trial, the Court frankly revealed his opinion about the case by stating to the plaintiff:

> All right. I have tried to persuade you since the very first hearing in this court, and we have had many, to get a lawyer, that you needed one, and that you ought to get one. You wouldn't do it.

The plaintiff responded that he had been out of work for over a year and could not afford an attorney. The Court replied as follows:

> Well, you had these lawyers that represented you in the State hearing. If you had had a good case, don't you think they would have brought it for you on a contingency basis? Did you ask them to bring it?

The plaintiff responded that he had asked these lawyers to represent him and they had refused. The Court then stated:

> Well, the Chambers firm, that is their specialty. They handle these kind of cases all over North Carolina. They are in this Court continuously handling those kind of cases. Now you had one of their lawyers representing you, did you talk to him about bringing this lawsuit?
>
> • • •
>
> [Did the fact that they wouldn't bring it] not indicate to you that you might not have a case?
>
> • • •
>
> If you thought you had a $265,000.00 case, don't you think if they thought that, they would jump at the opportunity to get a third of that?

These telling comments by the Court at the end of the trial confirm what is obvious throughout the trial; that this was a case to be "disposed of" rather than tried on its merits. From the very first page of the transcript, the Court takes control of these proceedings in an effort to dispose of this case in a summary fashion. He failed to give the plaintiff a full opportunity to present his case in an orderly manner and failed to hear and consider the facts the plaintiff struggled to present despite the hostile attitude of the Trial Judge.

At the beginning of trial the plaintiff and the defendant's counsel advised the Court that they could not agree on any stipulated facts. Obviously irritated, the Court stated: "So, we'll take a few minutes to see if the Court can *make you* agree on something." (emphasis added).

The Court then began to ask questions of both parties and declared that certain facts were stipulated. Most of those facts established essential elements of the defense to the plaintiff's due process claim. At the conclusion of this procedure, the Court declared that:

> Now, we have already established this morning *by consent,* that you had notice, that you had a hearing, that you were present in person at the hearing, you were allowed to bring witnesses to testify, and you were allowed to have your attorney to examine the witnesses. . . . Now the due process does not necessarily require all of those things. The due process requires that before life, liberty or property can be taken, it must be preceded by notice and an opportunity for hearing appropriate to the nature of the case. . . . Unless you have some evidence to show otherwise, the Court is going to have to hold as a matter of law that you had due process at your hearing. (emphasis added)

Earlier, the Court made the following comments concerning the plaintiff's claims and proposed evidence:

> I told you *all the time* that this case is not whether or not you are a good teacher or a bad teacher. That's not the issue here. The issue here is whether your constitutional rights have been violated and that's all. Whether or not you had due process at your hearing, and whether or not you have been denied your right of freedom of speech, you say freedom of the press—I don't see how in the world that can come into it, but you have alleged it—and your freedom of association. Now those are the things that you allege. And that is all this Court has jurisdiction over. This Court does not hire or fire school teachers. That's a State matter. This is a Federal Court. This Court will examine your hearing, will examine your discharge to see whether or not your constitutional

> rights have been violated, and that's all. That's all we are going to hear.

Throughout the trial, the Court repeated these instructions limiting the plaintiff's evidence. For example, the Court dismissed seven of the plaintiff's witnesses after they were sworn, but before they testified, because the plaintiff informed the Court in response to its question that their testimony pertained to his performance as a teacher. The plaintiff argued several times that he did not understand why he was being prevented from offering this evidence. He appeared to be very confused and flustered and unable to decide how he would prove his case without presenting evidence that the only reason cited for his discharge was untrue. He reluctantly discarded much of his prepared testimony and eventually neglected to introduce into evidence his personnel file, perhaps his most critical document. When the Court, after the close of the evidence, inquired as to the whereabouts of this document, the plaintiff responded:

> I am not an attorney, and I just forgot to enter that. I just assumed that the personnel file on which I was fired would be entered as part of the record.

While this assumption may not be valid in most cases, the Court in this case spent a great deal of time obtaining stipulations as to facts and documents. The plaintiff could therefore reasonably assume that his personnel file would be admitted without formal introduction.

Even with those witnesses permitted to testify, the Court intervened repeatedly and limited the scope of the examination by instructing the plaintiff as follows:

> Ask him about your due process rights, your freedom of speech, and your constitutional rights, not about whether or not you were a good teacher.
>
> • • •
>
> If you have any questions to this witness with reference to your lack of due process or your denial of freedom of speech, freedom of expression, freedom of association, freedom of press, ask it. Anything that pertains to the subject matters.
>
> • • •
>
> Now, let's get to these civil rights now. Any questions about . . . .
>
> • • •
>
> Mr. Williams, does he know anything about your civil rights?

At two different times during the course of the trial the Court made the following comments:

> If you have any further evidence of violation of your constitutional rights, you proceed. If you do not, you rest your case right now.

The open-ended and very broad questions directed to the plaintiff's witnesses by the Court were designed to, and in fact did, elicit negative answers. The Court asked several witnesses if they knew anything about any violation of the plaintiff's rights. Witnesses were obviously unwilling to express opinions as to matters of constitutional law. However, if allowed to develop these witnesses' testimony, the plaintiff might have been able to lay the foundation for their knowledge of specific facts tending to prove his case.

The Judge made other comments to the plaintiff which were belittling and which caused the plaintiff to repress his best efforts in presenting his case. The Judge referred to the plaintiff as "Brother Williams," told him on numerous occasions that his claim was "frivolous" and that he was "grasping at straws;" told him that he thought this case was "absurd;" told him that there was nothing in the newspaper article that he wrote that "any school teacher should take offense to;" and, when the plaintiff belatedly tried to offer his personnel file into evidence, stated that he wanted to "see what this momentous document is."

A thorough review of the entire transcript will reveal numerous other examples of this type of conduct by the Court.

This Court stated in *In re Murchison,* 349 U.S. 133, 136 (1955) that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'

The conduct of the District Court in the present action as summarized above clearly fails to meet these standards. Therefore, this Court should review this case in the exercise of its supervisory role over the lower federal courts.

———o———

CONCLUSION

For the reasons set forth above, the Petitioner urges the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted this 10th day of November, 1987.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1024

HOWARD WILLIAMS

Plaintiff-Appellant

v.

INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD, namely: BRUCE HAWKINS; ELEANOR BUTLER; TERRY CHILDRESS; JOHN MULL; SAM WAKEFIELD; BEN COZORT; J. T. KINCAID; JAMES D. WILSON, Superintendent of Burke County Schools; FRED CRANFORD; ERWIN HALLYBURTON; T. W. WALL; BILLY CAROWAY; GARY OGLE; ED HARDIN

Defendants-Appellees

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow Wilson Jones, District Judge (C/A No. 85-470-SH-C)

Submitted: June 12, 1987

Decided: July 16, 1987

Before WIDENER, HALL, and CHAPMAN, Circuit Judges.

(Howard Williams, Appellant Pro Se. Robert Livingston Thompson, Patton, Starnes, Thompson & Aycock, for Appellees.)

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from that court's order dismissing this civil rights complaint is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court.

Williams v. Individual Members of the Burke County School Board, C/A No. 85-470-SH-C (W.D.N.C., Dec. 11, 1986).

AFFIRMED

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

SHELBY DIVISION

SH-C-85-470

HOWARD WILLIAMS, Plaintiff, v. INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD namely BRUCE HAWKINS, et al., Defendants.	)	MEMORANDUM OF DECISION (Filed Dec. 11, 1986)

The Plaintiff, appearing *pro se,* brought this action pursuant to 42 U.S.C.A. §§ 1981, 1982, 1983 and 1985 and Amendments I, V and XIV of the United States Constitution. Plaintiff alleges in general that the Defendants violated his constitutional rights of due process, freedom of speech, freedom of press, and freedom of association when they dismissed him from his teaching position. The Defendants deny all of the alleged violations and assert that the Plaintiff was dismissed in accordance with North Carolina General Statute § 115C-325 for inadequate performance.

The Court heard this case at the December 1986 term in Rutherfordton, North Carolina and upon full consid-

eration of the pleadings, evidence and arguments now enters its findings and conclusions.

Upon stipulation of the parties, the following facts are established. Plaintiff began employment as a teacher in the Burke County School system in August of 1971, teaching English at East Burke High School. Effective August 16, 1983 the Burke County School Board transferred Plaintiff to Morganton Junior High School to teach seventh grade English. There was no reduction in pay accompanying the transfer and Plaintiff's employment contract makes no mention of transfer policy. The parties agree that state law provides that the school superintendent, at his discretion, recommends to the Board of Education matters concerning transfers, the Board will approve or disapprove, and the superintendent carries out the Board's decision. On April 30, 1984 Plaintiff and Superintendent Wilson had a conference where Plaintiff was given the opportunity to be heard concerning his suspension. On May 1, 1984 Superintendent Wilson notified Plaintiff in writing that he was suspending Plaintiff with pay, while a formal investigation of his teaching abilities ensued. On May 22, 1984 Supernntendent Wilson notified Plaintiff in writing that he was suspending Plaintiff without pay due to inadequate performance. Wilson further advised Plaintiff that Plaintiff's dismissal would be sought according to N.C.G.S. § 115C-325 and that Plaintiff had the right to request a hearing before the School Board. A copy of N.C.G.S. § 115C-325 was sent to Plaintiff. Plaintiff, then, requested a hearing before the School Board. Upon hiring an attorney, Plaintiff cancelled the Board hearing and requested a hearing before the Professional Review Committee pursuant to

N.C.G.S. § 115C-325(i). A panel of five was chosen by the State Superintendent of Public Instructions with the approval of Plaintiff, Plaintiff's attorney and Superintendent Wilson. No person objected to by Plaintiff was on the panel. After being notified in writing, Plaintiff was heard by the Professional Review Panel. Plaintiff was represented by counsel, he offered witnesses, he cross-examined Superintendent Wilson's witnesses, he presented evidence, and he appeared as a witness. Subsequent to the hearing, the Professional Review Panel found that Superintendent Wilson's evaluation of Plaintiff's job performance as inadequate was true and substantiated by a preponderance of the evidence. Superintendent Wilson advised Plaintiff in writing on August 2, 1984 that a recommendation to dismiss for inadequate performance would be made to the Burke County School Board and that Plaintiff had a statutory right to request a hearing before the Board. On August 20, 1984, Superintendent Wilson notified Plaintiff that a hearing had been set before the Board for Monday, September 10, 1984 at 7:00 p.m. The Court finds that Plaintiff cancelled the Board hearing because of a tentative negotiation/settlement. The Court further finds when the negotiations fell through, Superintendent Wilson notified Plaintiff of his intention to follow through with the dismissal process, that Plaintiff was notified that he would be heard before the Board on December 3, 1984 if he so desired and that Plaintiff failed to appear. As a result, Superintendent Wilson presented his findings to the School Board on December 3 resulting in the School Board dismissing Plaintiff effective December 3, 1984.

After careful consideration of all the evidence offered by the Plaintiff, including his own testimony and that

of his witnesses the Court is compelled to find and conclude that he has not shown any deprivation of his civil or constitutional rights and he has not met his burden of proving he was dismissed as a result of his exercising his constitutional rights or denied due process.

Under *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), an individual seeking to invoke the protections of the due process clause of the Fourteenth Amendment first must establish that he has been deprived of a liberty or property interest protected by that clause. *Wooten v. Clifton Forge School Bd.,* 655 F.2d 552 (4th Cir. 1981). To determine whether an individual has a protected property interest, the Court must look to "existing rules or understandings that stem from an independent source such as state law." There is a protected interest if a contract, either expressly or implicitly, provides for continued employment that can only be terminated for good cause. *Wooten* at 554. Plaintiff was a career teacher (tenured) by contract and under state law. His employment could be terminated only for cause as established under N.C.G.S. § 115C-325. Therefore, Plaintiff's teaching position was a protected property interest under the due process clause of the Fourteenth Amendment. Once a property interest is established, the "Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill,* 105 S.Ct. 1487, 1493 (1985). Those procedures are notice and an opportunity to respond "at a meaningful time." *Loudermill* at 1495, 1496. On April 30, 1984, Plaintiff attended a conference concerning his suspension where he had the opportunity to

respond to charges. In a letter dated May 22, 1984 from Superintendent Wilson, Plaintiff was notified of his right to request a hearing before the School Board pursuant to N.C.G.S. § 115C-325. Plaintiff requested a hearing, but later cancelled it in order that he pursue a hearing before the Professional Review Panel. After being notified in writing, Plaintiff had the opportunity to be heard before the Professional Review Panel. He was represented by counsel, offered witnesses, cross-examined witnesses, presented evidence and testified himself. In a letter dated August 2, 1984 from Superintendent Wilson, Plaintiff was again notified of his right to request a hearing before the School Board. On August 20, 1984, Superintendent Wilson notified Plaintiff that a hearing had been set before the School Board for Monday, September 10, 1984 at 7:00 p.m. Plaintiff again cancelled this hearing. Superintendent Wilson then notified Plaintiff that he would be heard by the School Board on December 3, 1984. Plaintiff failed to appear. Superintendent Wilson then presented his findings to the School Board during the December 3, 1984 meeting resulting in the School Board dismissing Plaintiff. Plaintiff was notified and afforded the opportunity to respond on five different occasions. He exercised his right to be heard on two occasions, one of those being a full scale hearing. He effectively waived any right to be heard by the School Board by either cancelling, or not showing up. The Court therefore finds as a matter of law that the Burke County School Board gave Plaintiff every opportunity to be heard and surpassed the due process requirement established in *Loudermill.*

Plaintiff also contends that he was denied his due process rights when he was transferred from East Burke

High School to Morganton Junior High School. The parties stipulated that transfers were made at the discretion of the Superintendent with approval of the School Board. There was no contract provision or law establishing Plaintiff's right to teach at East Burke High School rather than Morganton Junior High. There was also no reduction in pay. No liberty interest attached because Plaintiff remained an English teacher after the transfer. There was no stigma as set forth in *Sigmon v. Poe,* 564 F.2d 1093, 1096 (4th Cir. 1977). Accordingly, Plaintiff has not shown either a property interest or a liberty interest, derived from his contract or state law or Board action, upon which he can premise a constitutional claim that prior to transfer he was entitled to notice and a hearing.

Another of Plaintiff's contentions is that he was dismissed in retaliation for exercising his First Amendment rights of speech and press. To determine whether Plaintiff's First Amendment rights have been violated, the Court must establish whether the Plaintiff would have been dismissed "but for" the speech/press. *Daniels v. Quinn,* 801 F.2d 687 (4th Cir. 1986). The defendant-employer will not be liable if the dismissal would have occurred for other reasons, such as the plaintiff's own incompetence. This question is one of fact. The plaintiff-employee bears the burden of demonstrating that the protected speech/press was a motivating factor in the dismissal. *Daniels* at 689.

Plaintiff contends that because of a meeting he had with Superintendent Wilson concerning problems at East Burke High School, an article Plaintiff wrote in the local newspaper concerning merit pay and a speech Plaintiff made at a PTO meeting at Morganton Junior High School

concerning his transfer to that school, the Superintendent and personnel of the school system retaliated against him resulting in his being dismissed. Other than Plaintiff's self-serving accusations, he entered into evidence parts of his personal file which he contends show increased administrative pressure being put on him. Plaintiff contends the increased pressure is proof of retaliatory action. The deficiency in Plaintiff's allegations is that there are no witnesses to substantiate his claims and nothing in the record to link Plaintiff's speech with his eventual dismissal.

Superintendent Wilson testified that Plaintiff was dismissed on his recommendation due to inadequate performance. He categorically denied that any of Plaintiff's speech/press activities had any bearing whatsoever on the dismissal procedure. He said that upon realizing that Plaintiff had a problem with his teaching, Superintendent Wilson went to great lengths to help Plaintiff improve his teaching techniques. He testified that in the beginning he felt Plaintiff was worth salvaging but after efforts to help failed he was forced to proceed with dismissal proceedings. Plaintiff offered several witnesses which only tended to bolster Superintendent Wilson's testimony and contradict Plaintiff's contentions. Karla Blakey taught with Plaintiff at East Burke High School and testified for the Plaintiff. She stated that Plaintiff had more problems with discipline than the average teacher. Dorothy Jones taught with Plaintiff at East Burke High School and testified for the Plaintiff. She stated that Plaintiff's classes were chaotic and that students were known to throw "spit wads" in his class. Lynn Watkins taught with Plaintiff at Morganton Junior High School and also testified for the Plaintiff. She said she

frequently heard loud voices coming from Plaintiff's classroom. The testimony and the evidence reinforced Superintendent Wilson's contention that Plaintiff had a problem with his teaching. It is then reasonable to find that any increase in administrative activity toward Plaintiff was for one reason and one reason only, to help Plaintiff improve. No witness, no piece of evidence, other than Plaintiff's own assertions suggests otherwise. The Court therefore finds by the greater weight of the evidence that Plaintiff's contentions that he was dismissed in retaliation for exercising his First Amendment rights of speech and press are without merit.

Plaintiff further alleges that his transfer from East Burke High School to Morganton Junion (sic) High School was a retaliatory action for his meeting with Superintendent Wilson concerning problems at that school and thus a violation of his First Amendment right of free speech. Superintendent Wilson testified convincingly that at the meeting he sensed a friction between Plaintiff and the principal at East Burke. Upon a preliminary investigation, he found Plaintiff to be experiencing problems with his teaching. Superintendent Wilson testified that when a transfer was required due to a reduction in staff at East Burke, he considered this an excellent opportunity for Plaintiff to make a fresh start at a new school. He testified that he never considered the transfer a punitive measure. Therefore this Court finds by the greater weight of the evidence that the transfer was an administrative decision that in part was aimed at helping Plaintiff improve his teaching ability and was not a retaliatory action against Plaintiff.

In addition to the prior allegations, Plaintiff alleges that his right to freedom of association was violated in that he was not allowed onto the East Burke High School campus, and that the Defendants violated his rights under 42 U.S.C.A. § 1985. There being nothing in the record, other than Plaintiff's allegations, to support a denial of freedom of association or a conspiracy allegation, this Court finds that Plaintiff failed to prove these charges by the greater weight of the evidence. Additionally, allegations made under 42 U.S.C.A. §§ 1981, 1982 are without merit.

A judgment in accordance with these findings and conclusions shall be entered simultaneously herewith.

This the 8th day of December, 1986.

/s/ Woodrow W. Jones
United States District Judge

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

SHELBY DIVISION

SH-C-85-470

HOWARD WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
INDIVIDUAL MEMBERS OF THE BURKE-COUNTY SCHOOL BOARD, namely BRUCE HAWKINS, et al.,	)	(Filed Dec. 11, 1986)
	)	
Defendants,	)	

THIS MATTER was tried before the Court in Rutherfordton, North Carolina on December 2, 1986 and the issues having been determined as shown by a Memorandum of Decision entered simultaneously herewith;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover nothing of the Defendants and this action is hereby dismissed with prejudice.

The costs of this action are taxed against the Plaintiff.

This the 8th day of December, 1986.

/s/ Woodrow W. Jones
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1024

HOWARD WILLIAMS,

Plaintiff-Appellant,

versus

INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD, namely: BRUCE HAWKINS, et al,

Defendants-Appellees.

ORDER

(Filed Aug. 12, 1987)

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Hall and Judge Chapman.

/s/ H. E. Widener, Jr.

For the Court

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-838

In The

Supreme Court of the United States

October Term, 1987

HOWARD WILLIAMS,

Petitioner,

v.

INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD, namely: BRUCE HAWKINS; ELEANOR BUTLER; TERRY CHILDRESS; JOHN MULL; SAM WAKEFIELD; BEN COZORT; J. T. KINCAID; JAMES D. WILSON, Superintendent of Burke County Schools; FRED CRANFORD; ERWIN HALLYBURTON; T. W. WALL; BILLY CAROWAY; GARY OGLE; ED HARDIN,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner contends that certiorari should be granted on the grounds that the affirmation by the Fourth Circuit of the District Court Judgment (1) places it in conflict with the decisions of other courts and (2) "sanctions" a serious departure from the accepted and usual course of judicial proceedings. Each of these contentions

requires an incredibly giant leap in argument, causation, and logic that is insupportable from the evidence.

The Petitioner has artfully crafted the proposition that the Fourth Circuit "implicitly decided" that a plaintiff may not satisfy his burden of proof that his protected expression was a substantial or motivating factor in his dismissal except by direct evidence of unlawful motive and that circumstantial evidence may not be admitted for such purpose. Had the Fourth Circuit so held, there may very well have been demonstrated a conflict.

Review of the evidence reveals, however, that such was not the decision of the Fourth Circuit, "implicit" or otherwise. Rather, the decision of the District Court, affirmed by the Fourth Circuit, is more fairly characterized as a determination that the Petitioner has failed utterly, in the first instance, to demonstrate any reasonably plausible connection between his expressions and his ultimate dismissal.

The Petitioner, for purposes of his present action, attributes his difficulties with the school system to two instances of expression. (In other proceedings, the Petitioner has diligently attempted to demonstrate his adequacy as a classroom teacher and has been unsuccessful.) (1) In early 1983, he met privately with the Superintendent of Schools and expressed objection to Principal Wall's allowing rock concerts. (2) In October, 1983, he wrote a newspaper article critical of merit pay proposals, as to which the Petitioner has offered no evidence of displeasure, criticism, or even adverse comment from any school administrator, other than a statement attributable to Principal Caroway that he was not in agreement. In-

deed, as the District Court Judge observed, in essence, the newspaper opinion was quite innocuous and unobjectionable, by its very nature.

Therefore, by mere juxtaposition in time—indeed, times widely separated—the Petitioner introduces his instances of expression and his ultimate dismissal, and contends one has been caused by the other. The Petitioner cannot sustain the burden of proof imposed upon him by simple chronology of events.

The Petitioner attempts to connect his expressions to his dismissal by evidence of transfer from East Burke High School to Morganton Junior High School and by increased administrative activity, which, for such purposes, he characterizes as "interference." The transfer, referred to as a transfer to a "lower" school, was indeed lower only in the sense of age of children. The transfer was entirely permissible administratively, and was not in any respect a negative or prejudicial decision as to the Petitioner or his career, status, tenure, salary, or otherwise.

Upon commencing at the transferee school, Morganton Junior High School, the Petitioner, as the evidence shows, taught his classes and went about his duties for a significant period of time without more than the typical observation, involvement, or intervention by his superiors. Administration activity, again characterized by the Petitioner as interference, commenced upon the considerably growing number of occasions and instances in which the Petitioner was losing control of his classroom. Further, the "interference" consisted of activity customarily used by the school system in attempting to help its teaching staff with discipline and other problems. When these

efforts failed, and were resisted by the Petitioner, then, and only then, did the administration begin to move toward dismissal.

Secondly, the Petitioner contends that "by failing to comment upon the manner in which this trial was conducted, the Court of Appeals sanctioned a serious departure from the accepted and usual course of judicial proceedings." In essence, the Petitioner has sought to support this contention by picking and choosing items from the trial transcript in order to attempt to establish and demonstrate an attitude, predisposition, and predetermination by the trial judge.

Parties to litigation are entitled to, and the trial judge is responsible for enforcing, orderly procedure. The Petitioner, without counsel, often claimed difficulty in not being knowledgeable as to procedure. His difficulties, to some extent, had an effect upon the conduct of trial. Maintenance by the judge of customary and usual order in the proceedings was rendered more difficult because of this factor. The Petitioner contends that the various statements of the trial judge in this context demonstrate, in what amounts to a quite serious accusation, that the judge had (1) determined the outcome of the case before trial commenced, and that he had (2) determined to deny the Petitioner a trial on the merits. On the contrary, the judge's attitude and statements were a reflection of the difficulty encountered on account of the Petitioner's repeated failure to abide by instructions and rulings and especially the Petitioner's several editorial comments upon the manner in which he was being allowed to proceed.

The Petitioner's attempts to demonstrate the judge's pretrial attitude commence, in his Petition, by quotation of statements and questions by the judge as to the Petitioner having retained no lawyer, which exchange took place at the close of the trial. The Petitioner contends these comments "confirm what is obvious throughout the trial." While one might speculate, for his own purposes, what might have been in the mind of another, there has been no legally valid showing that the judge, who obviously felt that a lawyer would have been helpful to the Petitioner, had reached a pretrial decision because the Petitioner appeared without one.

Next, the Petitioner refers to the judge's development of a series of stipulated matters prior to the commencement of testimony. Rules of court require that the parties attempt to stipulate as to uncontroverted matters prior to trial. As was reported in open court, the Petitioner and the attorney for the Respondents were unable to stipulate to anything. The Petitioner, perhaps because of his anxiety about possibly unknowingly prejudicing himself, was unwilling to do so. Consequently, in a manner which properly shortened the proceedings, the Court walked the parties through a series of stipulations which dealt with any procedural due process issues. Although the judge did conduct this segment, the Petitioner did in every instance agree to the truth of the stipulated matters, for indeed they were all true, and no controversy existed as to prior proceedings.

Finally, the Petitioner complains of the summary manner in which the judge did not permit evidence as to his performance as a teacher. Initially it is noted, as recited in the District Court's Memorandum of Decision, there

did in fact take place the receipt of testimony of witnesses, called by the Petitioner, who testified as to his competency, which evidence was not supportive of the Petitioner's position. Of more fundamental significance, however, is the proposition, equally as supportable as the Petitioner's contention, that the Court had concluded that the Petitioner had failed, *in the first instance,* to carry his burden of showing his protected expression bore any causal connection as a substantial or motivating factor in his dismissal. In such case, the Petitioner was not entitled to present evidence that the stated grounds for his dismissal, his inadequate performance, was indeed a pretext. The Court's directives were that further evidence as to competency was not to be considered. By this stage of the trial, there had been introduced as part of the Plaintiff's case evidence both as to his being a competent teacher (the Petitioner's own testimony) and inadequate performance. The trial judge had discretion to limit what, according to his inquiries, was obviously going to be redundant evidence upon any issue there may have been as to performance.

CONCLUSION

The Petitioner's Petition should be denied because:

1. The Fourth Circuit did not "implicitly" decide that a plaintiff may not satisfy his burden of proof that his protected expression was a substantial or motivating factor in his dismissal except by direct evidence of unlawful motive and that circumstantial evidence may not

be admitted for such purpose. Therefore, there has been rendered by the Fourth Circuit no decision which is in conflict with the decisions of other courts.

2. The Fourth Circuit did not, by its failure to "comment" thereon, sanction a serious departure by the District Court Judge from the accepted and usual course of judicial proceedings for there was no such serious departure.

Respectfully submitted,

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